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5 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
6 **OF THE STATE OF CALIFORNIA**
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8
9 In the Matter of the Protest of:

10 **Xpedx**

11 Invitation for Bid No. 52986

Proposed Decision

12 A hearing on this protest was held on September 10, 2004, in Sacramento, California, by
13 Donna D. Ferebee, Hearing Officer, who was assigned to hear this matter by the Executive Officer of
14 the Victim Compensation and Government Claims Board (Board).

15 The protestant, Xpedx, was represented by Mark Howard, Xpedx Manager.

16 The Department of General Services (DGS), Procurement Division (Procurement), was
17 represented by Kathleen Yates, Senior Staff Counsel.

18 The proposed awardee, San Joaquin Distributors (San Joaquin), was represented by
19 Richard A. Harris, attorney at law.

20 Churchfield Trading Company (Churchfield), an interested party, was represented by its
21 owner, Charles Churchfield.

22 **Jurisdiction**

23 The protest complies with the procedural requirements of Public Contract Code
24 section 10306 and California Code of Regulations, title 2, sections 872.1 and 872.7(a).¹

25 **Basis for Protest**

26 In its detailed statement of protest, Xpedx advanced five bases for its protest which are
27 summarized as follows:

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29 ¹ All citations to regulations are to California Code of Regulations, title 2, unless otherwise specified.

1. The entire award is being made to San Joaquin, and in Group J, Xpedx's bid was lower than San Joaquin's bid by \$90,377.54.

2. San Joaquin's "all or none" bid should be eliminated as not compliant with the IFB's specifications because San Joaquin quoted food wrap instead of butcher paper on items 70, 71, and 72 of Group H.

3. San Joaquin claimed that all of its manufacturers would hold their price quotes through July 31, 2005, when in fact some would not.

4. It is not in the State's best interest to allow "all or none" bidding. Chinnet/Huhtamaki has in the past only quoted to San Joaquin which creates a price advantage for San Joaquin and does not allow for fair competitive bidding.

5. Xpedx questioned whether San Joaquin would actually be performing a commercially useful function as required by law.

Findings of Fact

1. Invitation for Bid (IFB) number 52986 is for a one-year statewide contract for disposable food service products, such as cups, plates, and food wrap. The IFB included ten groups and 100 items: Group A, items 1-33; Group B, items 34-43; Group C, items 44-48; Group D, items 49-52; Group E, items 53-59; Group F, item 60; Group G, 61-65; Group H, items 66-90; Group I, items 91-92; and Group J, items 93-100. The IFB stated that award could be based on individual group or on an “all or none” basis by grand total of all groups.

2. Xpedx submitted one “all or none” bid, with pricing on every group.

3. San Joaquin submitted two bids, one “all or none” bid with pricing on every group, and one bid quoting on Group C only.

4. Churchfield submitted one bid, with pricing only on Groups A, D, E, and J.

5. Xpedx, San Joaquin, and Churchfield were all found responsive to the technical specifications of the IFB.

6. Procurement decided to award to one bidder for all groups on an “all or none” basis. Procurement determined that San Joaquin was the lowest responsible bidder meeting specifications.

7. A notice of intent to award was posted on July 8, 2004, from which Xpedx filed its notice of protest the same day.

8. At the hearing, the hearing officer asked Xpedx to clarify its allegations as to points one and four of the detailed statement of protest summarized above. After some discussion, Xpedx withdrew its protest as to points one and four, stating that those points were not central to its protest.

9. The IFB provided that bids would be valid for 45 days following the date the responses were due. Since more than 45 days had elapsed without award of the contract, Procurement sought confirmation from bidders that their prices were still valid. San Joaquin confirmed with Procurement that it would still honor its pricing. Xpedx responded that it could not hold its pricing as to Groups A and H. Xpedx therefore could not supply the State with the items in those groups at the price it offered in its bid.

10. The hearing officer questioned the relevance of point three of the detailed statement of protest which alleged that some of San Joaquin's manufacturers could not hold their pricing. In response, Xpedx withdrew point three as a basis for its protest.

11. Xpedx's representative, under questioning by the hearing officer, stated at the hearing that point five of the detailed statement of protest was not an allegation that San Joaquin would not perform a commercially useful function. The representative clarified that whether San Joaquin had met the commercially useful function criteria was simply a question it had asked of Procurement.

Determination of Issues

1. Xpedx has the burden of proving by a preponderance of the evidence that it was the lowest responsible bidder meeting specifications. (Reg. §§ 873.7(a), 873.8.)

2. The Board may dismiss a protest if the detailed statement of protest fails to state a basis upon which the protest may be upheld. (Reg. § 872.10(b).)

3. The general rules of contract law apply to the competitive bidding process. (*Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110, 123.) A bid is an irrevocable offer or option which is a contract right that cannot be denied the public agency unless the requirements for rescission are satisfied. (*M.F. Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 700, citing *Conduit & Foundation Corp. v. Atlantic City* (1949) 2 N.J.Super. 433.) Once

1 an agency accepts the offer, a mutually binding contract results. (*Conduit & Foundation Corp. v.*
2 *Atlantic City, supra*, 2 N.J.Super. at p. 439.)

3 4. Xpedx's failure to hold the pricing contained in its bid for Groups A and H gives it a
4 unique advantage over the other bidders. If its protest were to be upheld concerning San Joaquin's
5 failure to comply with the specifications concerning items 70, 71, and 72 of Group H, and Procurement
6 decided to award that portion of the contract to Xpedx, it would have the option of deciding whether or
7 not it wanted to offer the contract for the price contained in its bid. This is contrary to the fundamental
8 principles of the competitive bidding process described above. Unless authorized by the rules of the
9 procurement, a bid that is not an irrevocable offer or option is not a valid bid. As an invalid bid as to
10 Group H, Xpedx cannot show that it was the lowest responsible bidder meeting specifications for that
11 group. Xpedx contends in point two of its detailed statement of protest that San Joaquin should not be
12 awarded Group H. Point two is dismissed because it does not state a basis upon which its protest
13 could be upheld.

14 5. In the alternative, by not agreeing to be bound by the prices included in its bid, Xpedx
15 withdrew from the competition as to Groups A and H. Having withdrawn from the competition as to
16 those groups, Xpedx does not have standing to protest the award of Group H. A protest can only be
17 submitted by a "bidder," which is defined as an individual or entity that submitted a final bid in response
18 to a solicitation. (Reg. § 870.3(a)(2), (a)(11).) Xpedx withdrew its bid as to Groups A and H by refusing
19 to hold its pricing terms, and is thus not a "bidder" under the regulations as to those two groups.
20 Because of this, the Board does not have jurisdiction over point two of the detailed statement of protest,
21 and it is dismissed.

22 6. Points one, three, and four of the detailed statement of protest were withdrawn by
23 Xpedx at the hearing, and therefore are not bases upon which the protest could be upheld.

24 7. Point five of the detailed statement of protest is dismissed because it does not state a
25 basis upon which the protest could be upheld since it does not allege that San Joaquin failed to
26 satisfy the commercially useful function criteria.
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Order

The protest to the award of a contract under IFB number 52986 is dismissed.

Date: September 14, 2004

DONNA D. FEREBEE
Hearing Officer
Victim Compensation
and Government Claims Board

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5 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
6 **OF THE STATE OF CALIFORNIA**
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9 In the Matter of the Protest of:

Notice of Decision

10 **Xpedx**

11 Invitation for Bid No. 52986

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13 On September 24, 2004, the California Victim Compensation and Government Claims Board
14 adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced
15 matter. The Decision became effective on September 24, 2004.

16 Date: September ____, 2004

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18 JUDITH A. KOPEC
19 Chief Counsel
20 California Victim Compensation and
21 Government Claims Board
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